92-1571

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

DAVID RANDALL JENKINS
and STACIA LEE SUMWALT,

Petitioners

v.

STATE OF ARIZONA,

Respondent.

Petition For A Writ Of Certiorari To The
Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

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March 26, 1993

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower court deny Petitioners due process by holding that a corporation co-defendant's dismissal with prejudice, entered upon the government's motion and consent, lacked sufficient finality to give rise to the defenses of *res judicata* or collateral estoppel in a subsequent prosecution against Petitioners?

2. Did the lower court deny Petitioners due process by depriving Petitioners of the preclusive effects of a dismissal with prejudice against a corporation co-defendant where Petitioners were substantially identical or mutual parties in the original case?

3. Does the Double Jeopardy Clause protect mutual parties from subsequent prosecution where the state's case against a corporation co-defendant is dismissed with prejudice?

LIST OF PARTIES

The parties to the proceedings below were Petitioners David Randall Jenkins and Stacia Lee Sumwalt, and Respondent State of Arizona.

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No.

DAVID RANDALL JENKINS
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STATE OF ARIZONA,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

Petitioners David Randall Jenkins ("Jenkins") and Stacia Lee Sumwalt ("Sumwalt") respectfully request that a writ of certiorari issue to review an August 12, 1992 Order of the Arizona Court of Appeals denying Petitioners protection under the Double Jeopardy Clause of the Fifth Amendment and the doctrines of *res judicata* and collateral estoppel.

DECISIONS AND ORDERS BELOW

The November 5, 1992 Order of the Arizona Supreme Court denying review of the Arizona Court of Appeals' August 12, 1992 Order is not a reported decision. A copy of the Arizona Supreme Court's November 5, 1992 Order in the proceedings below can be found in the Appendix at 1a.

The August 12, 1992 Order of the Arizona Court of Appeals denying Petitioners relief under the Double Jeopardy Clause of the Fifth Amendment and the doctrines of *res judicata* and collateral estoppel is not reported. It is reproduced at App. 3a. The February 3, 1992 Order of the Superior Court of the State of Arizona denying Petitioners motion on the same theories, also unreported, is reproduced at App. 4a.

JURISDICTION

Petitioners filed their motion to dismiss the state criminal proceedings on Double Jeopardy, *res judicata* and collateral estoppel grounds on December 4, 1991. On February 3, 1992, the Superior Court of Arizona denied that motion.

Litigation ensued in the Arizona Court of Appeals, Petitioners seeking a pre-trial final determination as to their Double Jeopardy claims. On August 12, 1992, the Arizona Court of Appeals assumed jurisdiction over the subject matter by Special Action and denied Petitioners relief. Petitioners then filed a timely Petition for Review in the Arizona Supreme Court which was denied on November 5, 1992. Justice O'Connor extended the time for filing the instant Petition to and including March 26, 1993.

This Court has jurisdiction to review the August 12, 1992 Order of the Arizona Court of Appeals at this juncture. As to the Double Jeopardy claim, the Court has previously held that an interlocutory order denying a Double Jeopardy claim is a final order for review purposes since the protection afforded by the Fifth Amendment would be lost absent pre-trial review. *Abney v. United*

States, 431 U.S. 651, 661 (1977); *Bullington v. Missouri*, 451 U.S. 430, 437 n. 8 (1981).

The "collateral order" doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) authorizes review of state supreme court rulings on certain issues that are separate from the merits of the prosecution. Under the *Cohen* collateral order doctrine, for an order to be reviewable it must (1) be independent and easily separable from the substance of other claims in the action; (2) present a need to secure prompt review in order to protect important interests of a party; and (3) be examined in the light of practical, rather than narrowly technical, considerations. These factors obtain here.

The *res judicata* and collateral estoppel claims are independent and easily separable from the substance of other claims in the action below. The need to secure this Court's prompt review over the common law *res judicata* and collateral estoppel claims is essential to protect the Petitioners' rights to due process. This Court has held that review is appropriate where it is required to protect a right "the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978). Here, Petitioners will be injured if they are forced to relitigate claims and issues which ought to be foreclosed from further prosecution.

Accordingly, this Court has jurisdiction to review Petitioners' Double Jeopardy, *res judicata* and collateral estoppel claims under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the Constitution are reproduced at App. 1b and 2b. Section 1257 of Title 28, United States Code and Rules 16.5, 26.1 and 35.1 of the Arizona Rules of Criminal Procedure, 17 Arizona Revised Statutes are found at App. 3b - 6b.

STATEMENT

Petitioner David Randall Jenkins is the controlling shareholder and President of JNC Corporation, an Arizona corporation, founded in 1981. Petitioner Stacia Lee Sumwalt, Mr. Jenkins' wife, was a licensed securities salesperson who sold limitied partnership interests through JNC's wholly-owned broker-dealer company. One of the principal activities of JNC was the sale of JNC limited partnerships in which the limited partners executed a promissory note rather than investing cash at the time of subscription. JNC limited partnerships held approximately $80 million in receivables based on the limited partner subscription promissory notes.

In September 1987 Petitioner Jenkins and JNC filed for protection under Chapter 11, and a trustee was appointed. In the meantime, in collateral proceedings, the limited partners sought to cancel their indebtedness to the JNC limited partnnerships that would avoid debt relief income tax consequences.

In September 1989 a Grand Jury in Pima County, Arizona returned a true bill against Petitioners Jenkins and Sumwalt, JNC and others (CR-28738). The bill alleged 285 counts against Jenkins and the JNC Corporation, including fraud and the sale of unregistered securities in connection with the sale of JNC limited partnerships. More than 250 counts against Jenkins and JNC alleged the sale of unregistered securities, in violation of Ariz. Rev. Stat. 44-1841. Some 37 counts were filed against Petitioner Sumwalt. In all material respects, the charges against Jenkins and JNC were identical. Sumwalt was charged only with the sale of unregistered securites. In each such count, Jenkins and Sumwalt were charged identically. In proceedings in Arizona Superior Court, Petitioners and JNC claimed that the criminal proceedings were brought in bad faith, that the purpose of the Grand Jury proceedings was to assist JNC's limited partners -- most of whom were prominent citizens in Pima County where the indictments were returned -- to obtain a tax-free release from their obligations on their subscription promissory notes.

In September, 1989, the State offered a plea bargain to JNC in which JNC would have admitted its wrongdoing and accepted a fine of $100, terms the trustee in bankruptcy considered favorable to the estate. JNC, through counsel retained by its board of directors, strenuously objected, and sought an order declaring that JNC was entitled to be represented by counsel chosen by its board of directors rather than by the bankruptcy trustee. The Arizona Court of Appeals agreed. *The JNC Companies v. Meehan*, 797 P.2d 1 (Ariz. App. 1990) (App. 1c). The court of appeals found that the trustee had a fiduciary duty to the creditors and a responsibility to preserve the estate, and that these duties conflicted with the interests of the corporation in assessing the evidence and clearing its name. (App. 8c - 10c.) The court of appeals then pointed out that JNC's admission of wrongdoing might be employed by the limited partners as the basis for rescinding their promissory notes, rather than forgiving them, thereby freeing the limited partners of the tax consequences of the debt cancellation. (App. 8c.)

The court of appeals found that the fact JNC had filed in bankruptcy did not mean "that JNC must relinquish its right to a jury trial simply because the trustee considers it a sound business decision and in the estate's best interest." (App. C-10) Accordingly, the court of appeals vacated the trial court's order recognizing counsel selected by the bankruptcy trustee. Following this order, the defense of JNC and Jenkins was controlled wholly by Jenkins, who engaged counsel for JNC and worked closely with him in the preparation of various pleadings.

In April 1991, nearly two years after JNC, Jenkins and Sumwalt were indicted and nearly four years after JNC had filed for Chapter 11 protection (but just months after the adverse ruling by the Arizona Court of Appeals), the State filed to dismiss all charges against JNC with prejudice. JNC stipulated to the dismissal, and its dismissal was ordered in May 1991 upon an explicit finding by the trial court that such disposition was in the best interests of the parties.

Petitioners Jenkins and Sumwalt then moved for dismissal of the charges against them on the ground that, given the identical nature of the charges and their relationship to JNC in the same proceeding, they were entitled to interpose JNC's dismissal with prejudice in their own defense.[1] More particularly, Petitioners claimed that in light of JNC's dismissal, their prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment and the doctrines of *res judicata* and collateral estoppel. In February 1992, the Arizona Superior Court denied Petitioners' motion on the theory that "[a] dismissal with prejudice is not per se an 'adjudication.'" (App. 4a.) The court acknowledged, however, that "had JNC and the State entered into an agreement concerning the factual and legal issues of the case ... the State might well be estopped collaterally from relitigating the issue against the corporate officers." (App. 5a.)

The Arizona Court of Appeals denied relief in a brief summary opinion stating that the dismissal of charges against JNC "did not result in final judgment for Double Jeopardy, *res judicata*, or collateral estoppel purposes." (App. 3a.) On November 5, 1992, the Arizona Supreme Court denied Petitioners' Petition for Review. (App. 1a.)

REASONS FOR GRANTING THE PETITION

This case presents the Court with three issues left unanswered by the Court's evolving Double Jeopardy jurisprudence and the law concerning finality of judgments in criminal procedure. The first is whether a dismissal "with prejudice" constitutes a final judgment with preclusive effect. If so, where a case against a corporate defendant has been dismissed "with prejudice" may the state later prosecute, on the same grounds, substantially identical or mutual parties who were co-defendants in the original case? The notion of a dismissal "with prejudice" carries dramatic legal

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1 Since November 1992 the Superior Court has dismissed approximately 250 of the counts against Petitioner Jenkins and 32 of the counts against Sumwalt.

force, denoting a careful and circumspect determination by the trial court that further prosecution against the dismissed party be precluded forever. State action threatening the integrity of this principle strikes at the heart of due process. Equally important is the Double Jeopardy question raised by the state's re-prosecution of mutual parties, where the parties have sought to interpose a corporate co-defendant's dismissal "with prejudice" as a bar to such prosecution. Because these issues involve unresolved questions of constitutional dimension, the Court should take this opportunity to clarify the law in these important areas.

A. In a State Criminal Case, a Trial Court's Dismissal "With Prejudice" Constitutes "Finality" Sufficient To Invoke the Doctrines of *Res Judicata* Or Collateral Estoppel.

1. Under the doctrine of *res judicata*, a valid final judgment operates as an absolute bar to a subsequent action between the same parties or those in privity with them upon the same claim. The sweep of the principle is quite broad: "*Res judicata* forecloses all that which might have been litigated previously." *Brown v. Felson*, 442 U.S. 127, 138 n.10 (1979). The related doctrine of collateral estoppel provides that when an issue has been determined by final judgment, it cannot be litigated again between the same parties or their privies on a different cause of action. *Ashe v. Swenson*, 397 U.S. 436 (1978). Again, the disposition is conclusive as to every point raised by the record which could have been decided with respect to the parties and their privies, in all other actions. *Fraternal Order of Police, Lodge 2 v. Superior Court in and for the County of Maricopa*, 596 P.2d 701 (1979).

In either case, the force of the "estoppel" is the judgment itself -- as an action with independent legal efficacy -- rather than the underlying findings of the court. *State v. Nunez*, 806 P. 2d 861, 865 (1991). That *res judicata* and collateral estoppel are applicable in criminal actions, both for and against the defendant, is generally accepted in Arizona. *State v. Forteson*, 447 P.2d 560 (Ariz.App. 1968); *State v. Little*, 350 P. 2d 756 (1960).

2. Under the Arizona Rules of Criminal Procedure, the trial judge has the discretion to dismiss a case with or without prejudice.[2] The rule strongly favors dismissal without prejudice, and there can be no dismissal with prejudice unless the court affirmatively determines that the interests of justice require that specific disposition. *Quigley v. City Court of the City of Tucson*, 643 P. 2d 738, 739 (Ariz. App. 1982).

A dismissal with prejudice signifies that the trial court has undertaken a "reasoned finding" that the action is appropriate and that the judge has carefully weighed all relevant factors bearing on the decision. The requirement of a "reasoned finding" ensures that the court properly balances the respective interests of the state and the defendant, the most important factor being whether delay in the prosecution will result in prejudice to the defendant. *State v. Hannah*, 578 P. 2d 1039,1040 (Ariz. App. 1978). The state's interest is in "one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). The defendant's principal interest is in putting an end to the proceedings. *Abney v. United States*, 431 U.S. 651, 661 (1977).

Moreover, a dismissal "with prejudice" is functionally equivalent to an acquittal. Dismissals with prejudice are deemed adjudications on the merits that bar the state from bringing or maintaining an action on the same cause. *Goldberg v. Warden*, 622 F. 2d 60,65 (3rd Cir. 1980; *United States v. Cejas*, 817 F.2d 595, 598 (9th Cir. 1985); *Suttle v. Seely*, 94 Ariz. 161, 382 P.2d 570 (1963). This Court has explained that when a proceeding intended to end "all prosecution of the defendant for the offense charged" is terminated in favor of the defendant, an acquittal has occurred. *Lee v. United States*, 432 U.S. 23, 30 (1977). Not surprisingly, therefore, a judgment of dismissal with prejudice

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2 Rule 16.5, Ariz.R.Crim.P., 17 A.R.S., provides: **Effect of Dismissal**. Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice.

has been held by some lower courts to have preclusive effect. *See, e.g., Reynolds v. Int'l Harvestor Co.*, 141 F. Supp. 371 (ND Ohio 1955)(entered on stipulation of the parties) *aff'd* 233 F. 2d 959 (6th Cir. 1956).

3. There is no distinction between a trial court's final order dismissing a criminal case with prejudice and a final judgment of acquittal after a trial. A final judgment is any prior adjudication of an issue "that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) Judgments (1980) §13. Being "an adjudication on the merits," *(Goldberg v. Warden, supra)* a dismissal with prejudice, like a judgment, is the law's last word in a judicial controversy. This Court has held that final orders as well as final judgments give rise to *res judicata* and collateral estoppel opportunities. *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *accord, Maggio v. Zeitz*, 333 U.S. 56 (1948).

Because the preclusive effects of *res judicata* or collateral estoppel are a function of the final judgment or order itself, the progress of the underlying litigation is not determinative where the litigation has been concluded by a dismisal "with prejudice." Indeed, the Court addressed this very question more than seventy-five years ago in the germinal case of *United States v. Oppenheimer*, 242 U.S. 85 (1916). In response to the prosecution's suggestion that "a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury," the Court stated:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled. . . . We do not suppose it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words.

Oppenheimer, 242 U.S. at 87.[3]

4. In the instant case, the trial court made a determination, precipitated by the State's own motion, that the best interests of the State and the defendant JNC required dismissal with prejudice of all charges against JNC. Unquestionably, the State intended to forego its opportunity to prosecute JNC for the offenses charged. As a consequence, the State forever waived its right to present evidence against JNC, to call witnesses or to cross-examine JNC's witnesses, and conceded the issues submitted to the trial court for determination.

In an analogous case, the Illinois Supreme Court held that a dismissal with prejudice amounted to an adverse adjudication on the merits against the complaining party. *People v. Creek*, 447 N.E.2d 330, 332 (1983). The court found that the dismissal with prejudice operated as a constitutional bar, under the Double Jeopardy Clause of the Fifth Amendment, and held that since the prosecution moved for the dismissal with prejudice, the dismissal amounted to an acquittal. *Creek*, 447 N.E.2d at 333. The

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3 In point of fact, the State had a full opportunity to litigate its claims and the State's motion to dismiss JNC came after considerable litigation actually had occurred. As alluded to in Petitioners' Statement herein, when JNC was arraigned, the trustee in bankruptcy appeared with the intention to represent JNC in the criminal proceedings and to enter a guilty plea on JNC's behalf. Counsel Donald E. Gabriel, pursuant to instructions from Jenkins, made an appearance on behalf of JNC and entered a not guilty plea. Thereafter, JNC filed its first motion to dismiss CR-28738, in December 1989, on the ground that the indictment failed to allege the predicate elements of a security transaction. JNC also moved to disqualify the Pima County Judges from trying CR-28738. JNC then pursued three Special Actions in the Arizona Court of Appeals, obtaining relief on each occasion. In March 1991, JNC filed substantive motions to dismiss the prosecution as undertaken in bad faith and to disqualify the Pima County Attorney. The State subsequently moved unilaterally for JNC's dismissal with prejudice, plainly manifesting its intention to end all prosecution against JNC. The State obtained the relief it sought in moving to dismiss JNC. It elected not to seek appellate review to alter, amend or change the trial court's final Order of dismissal with prejudice.

prosecutor's inclusion of the phrase "with prejudice" in her motion to dismiss, coupled with the signed approval of the prosecutor and defense counsel on the dismissal orders, indicated to the court an intention to terminate the proceedings in the defendant's favor in such a way as to bar further action. Hence, the defendant's subsequent conviction was constitutionally infirm. *Id.*

A similar rationale governs the intelligent resolution of this case. Nevertheless, the Arizona Court of Appeals concluded that JNC's dismissal with prejudice did not result in a "final judgment" for purposes of Double Jeopardy, *res judicata* or collateral estoppel. Because that ruling, perfunctorily affirmed by the Arizona Supreme Court, was inconsistent with the weight of authority and with sound policy, it should not stand.[4]

B. A Dismissal With Prejudice As To a Corporate Co-defendant Precludes the State From Prosecuting Substantially Identical Or Mutual Parties Who Were Defendants In the Original Case.

1. The law of final judgments recognizes the injustice threatened if the State were permitted to prosecute an individual sufficiently aligned with another party as to whom re-prosecution would be precluded. Thus, for example, where there is "substantial identity" between Party X and Party Y, and a dismissal with prejudice is entered in X's favor, Y may interpose that disposition to preclude his subsequent prosecution on the same grounds.

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4 In support of its conclusion, the court of appeals cited without analysis, the Arizona Supreme Court's decision in *State v. Nunez*, 806 P. 2d 861 (1991). However, the court's reliance on *Nunez* was misplaced. That case involved a re-trial on motion of the defendant, who had been neither convicted nor acquitted. His verdict before judgment had no "finality" and therefore could not be interposed to preclude re-trial.

Whether sufficient alignment of interest exists depends upon the circumstances of the case. Identity of parties may exist between a controlling officer and shareholder, and the corporation. *See, e.g., Dudley v. Smith*, 504 F. 2d 979 (5th Cir. 1974); *Kreagor v. General Electric Co.*, 497 F. 2d 468 (2nd Cir. 1974), *cert. denied*, 419 U.S. 861 (1974). The stockholders of a corporation may be deemed in privity with the corporation as to all corporate matters, and, in the absence of fraud, are bound by a decree against the corporation which establsihes a liability. That judgment may not be attacked collaterally by the stockholders. *James v. Central Trust Co.*, 98 F. 489 (4th Cir. 1899).

A further factor reflecting such alignment of interests as to bar prosecution of X is the extent to which control of the defense of Y lay in X's hands. Even a non-party who participates significantly in the defense and holds an interest close to the litigation, may be bound by the resulting judgment as though he were a party to the action. Thus, in *Suffront v. Compagnie des Sucreries*, 217 U.S. 475 (1910), the Court stated:

> [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the . . . defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would if he had been a party of record.

Id. at 486-87.

The traditional requirement of "mutuality of estoppels" is still required in state criminal cases in Arizona. *State v. Jimenez*, 634 P.2d 950, 952 (1981); *State v. Stauffer*, 536 P.2d 1044 (1975), and this Court relatively recently has upheld the soundness of the rule in the criminal context. *Standefer v. United States*, 447 U.S. 10 (1980). Nonetheless, there is no question but that Jenkins and Sumwalt, both defendants in the original case against JNC, satisfy

the mutuality of estoppels requirement. Both are thus entitled to claim whatever preclusive benefit may otherwise be available to them on *res judicata* or collateral estoppel grounds.

2. A plain identity of parties exists as between Jenkins and JNC, flowing from Jenkins' majority ownership and control of the company. Indeed, Jenkins' control over JNC was directly relied upon by the State in framing its case. Moreover, Jenkins actively participated in JNC's defense. Jenkins' directing role in the JNC litigation is reflected in *JNC Companies v. Meehan*, 797 P.2d 1 (Ariz.App. 1990)(App. 1c) as well as in numerous motions filed by JNC in the proceedings below. As JNC's controlling shareholder and the orchestrator of JNC's defense, Jenkins is entitled to the preclusive effects generated from JNC's dismissal with prejudice.

Jenkins and Sumwalt may properly raise the dismissal with prejudice as a bar to their re-prosecution on the separate ground that both, as original co-defendants with JNC, are mutual parties vis-a-vis the State as to the original litigation. Because the dismissal with prejudice of JNC constituted an adjudication on the merits functionally equivalent to an acquittal, Jenkins and Sumwalt are entitled to the preclusive force that the dismissal would carry if asserted by JNC itself.

The extent to which Jenkins' and Sumwalt's interests were consonant with JNC's interests, exposing each to substantial prejudice upon an adverse ruling as to JNC, should be especially transparent given the nature of the charges. Had the State prevailed at trial against JNC on the strict liability securities claims, the trier of fact would have been compelled to find Jenkins and Sumwalt guilty.[5] Accordingly, as to the strict liability securities

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5 Since the time the Arizona Supreme Court denied review on November 5, 1992, the trial court has ruled that all CR-24054 charges against Jenkins be dismissed with prejudice. Additionally, the trial court has since dismissed with prejudice approximately 250 CR-28738 felony counts against Jenkins and 32 CR-28738 felony counts against Sumwalt. The four remaining CR-

offenses determined in JNC's favor by the dismissal, Jenkins and Sumwalt could not be found guilty.

C. The Double Jeopardy Clauses Of the Fifth Amendment And the Arizona Constitution Protect Mutual Parties Where the State's Case Against A Corporate Co-defendant Is Dismissed With Prejudice.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S.Const.amend.V. This constitutional guarantee applies to the states through the Fourteenth Amendment. *Illinois v. Vitale*, 447 U.S. 410 (1980). A similar provision is found in Article 2, §10 of the Arizona Constitution. The guarantee against Double Jeopardy protects against three threats to the individual: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

As demonstrated in Sections A and B above, the dismissal "with prejudice" of JNC constituted an adjudication on the merits, conclusive of the rights of the parties as if the case had been prosecuted through successive stages of litigation by the State. It is beyond cavil that JNC could not, at this juncture, be re-prosecuted on the same grounds which formed the predicate for the original prosecution. Indeed, the prospect of a subsequent re-prosecution of JNC in these circumstances would violate our most basic intuitions of justice and fairness. Unanswered by the law to date, however, is the issue of the extent of the Double Jeopardy Clause's reach in the direction of individuals who were

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28738 felony counts against Sumwalt involve only the sale of unregistered securities. The remaining CR-28738 felony counts against Jenkins, approximately twenty in number, involve principally the securities counts.

mutual parties vis-a-vis the State in the original prosecution, but whom the dismissal with prejudice did not by express terms include. This Court's guidance is required to settle this important question.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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November 5, 1992

RE: DAVID RANDALL JENKINS/STACIA LEE SUMWALT vs. HON. JOSEPH D. HOWE-PIMA CO SUP CT/THE STATE OF ARIZONA
Supreme Court No. CV-92-0388-PR
Court of Appeals No. 2 CA-SA 92-0070
Pima County Nos. CR-28738 and CR-24054

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 3, 1992, in regard to the above-referenced cause:

ORDERED: Application for Interlocutory Stay of Proceedings Pending issuance of Appellate mandate = DENIED.

FURTHER ORDERED: Motion for Leave to file Supplement to Petition for Review = GRANTED.

FURTHER ORDERED: Petition for Review by the Supreme Court = DENIED.

FURTHER ORDERED: The stay previously entered is dissolved.

Record returned to the Court of Appeals, Division Two, Tucson, this 5th day of November, 1992.

NOEL K. DESSAINT, Clerk

TO: Donald E. Gabriel, Esq.
Marshall D. Tandy, Esq.
David Randall Jenkins, c/o Donald E. Gabriel, Esq.
Stacia Lee Sumwalt, c/o Marshall D. Tandy, Esq.
Stephen D. Neely, Esq., Pima County Attorney -
ATTN: Howard L. Fell, Esq.
Hon. Joseph D. Howe, Maricopa County
Superior Court
James N. Corbett, Clerk, Pima County Superior Court
(Certified Copy)
Joyce A. Goldsmith, Clerk, Court of Appeals,
Division Two, Tucson
West Publishing Company
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FILED BY CLERK
AUG 12, 1992
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

August 12, 1992

RE: JENKINS; SUMWALT v. STATE
2 CA-SA 92-0070
Pima County Superior Court Cause No. CR-28738; CR-24054

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department A, on August 10, 1992, in the above-referenced cause:

"ORDERED: It appearing to the court that petitioners are without an adequate remedy by appeal, we assume jurisdiction.

It further appearing that the trial court acted properly in denying petitioners' Motion to Dismiss Prosecutions as Barred by the Double Jeopardy Clauses of the Fifth Amendment and Article 1, Sec. 10, Ariz. Const. and/or the Common Law Doctrines of Res Judicata and/or Collateral Estoppel, since the dismissal of charges against the JNC Corporation did not result in a final judgment for double jeopardy, res judicata, or collateral estoppel purposes, State v. Nunez, 167 Ariz. 272, 806 P.2d 861 (1991),

Therefore, it is ordered that petitioner's claim for relief is denied.

Judges Fernandez and Druke concurring."

JOYCE A. GOLDSMITH, Clerk

FILED
February 3, 1992
_____Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA Plaintiff,	)	
	)	Nos. CR-24054
vs.	)	& CR-28738
DAVID RANDALL JENKINS, et al.,	)	ORDER
Defendants.	)	

The parties have stipulation that pending motions are submitted for decision without oral argument. The court has read the pleadings in those motions and rules as follows:

I.

Defendants' (Jenkins & Sumwalt) Motion to Dismiss Prosecution as Barred by Double Jeopardy Clauses, etc., is denied.

A dismissal with prejudice is not per se an "adjudication".

Thus, defendants' arguments based on the premise that the legal and factual issues of this case have been "adjudicated" are without logical support.[1] For instance, *Suttle v. Seely,* 94 Ariz. 161, 382 P.2d 570 (1963), cited by defendants, demonstrates analytically that the *dismissal there was part of an agreed settlement of the litigated issues*; as such, the position of the plaintiff was "built into" the dismissal, and became *res judicata* as to him

[1] Whether laws relating the "adjudication" of civil cases are applicable in criminal cases is not the question here.

barring a second suit on the same issues that had been settled. thus, there *was* "adjudication."[2]

In our case, had *JNC* and the State entered into an agreement concerning the factual and legal issues of the case (for instance, "that the conduct of JNC violated no state law") and had the agreement included prejudicial dismissal, the State might well be estopped collaterally from relitigating the issue against the corporate officers; but, of course, the situation here is otherwise, and defendants' final claim that the state's stated motive for dismissal is "disingenuous" is no replacement for analysis.

II.

State's Motion to Strike is denied. The State shall file and serve its responses to the targeted motions on or before March 16, 1992.[3]

This ruling is not a comment on or an adjudication of the merits of any of the targeted defense motions. On the other hand, defense counsel are cautioned that inefficient and

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[2] Compare *Cochise Hotels v. Douglas Hotel Operating Co.*, 83 Ariz. 40, 316 P.2d 290 (1957), cited in *Suttle v. Seely, supra*, where a landlord sued a tenant under a lease and the parties settled with agreement the suit be dismissed with prejudice. In a later suit by the tenant for return of the security deposit, the landlord argued that the tenant was barred by failure to raise the issue in a counterclaim in the suit which was dismissed. But the court held the *issue* of the right to return of the deposit did not arise until the end of the dismissed suit, which terminated the tenant's obligations under the lease. Therefore, the *issue* of the right to refund of the security deposit was *not adjudicated* in the earlier suit.

This case demonstrates that Arizona law requires a careful analysis of the *actual issues adjudicated*. That a prejudicial dismissal and a final judgment are both terminal dispositions of a case does not mean they are both *adjudications of litigated issues*.

[3] Unless defendants obtain a stay order concomitant with their promised "appeal." Defendants' Opposition to State's Motion to strike, par. #9; and Memorandum thereto, pp. 7-8.

redundant writing often frustrates effective communication even as wheat may be lost in chaff.[4]

J.D. Howe
Judge of the Superior Court
February 3, 1992

[4] For instance, the defendants' "Opposition to State's Motion to Strike" is nearly four pages long; the "memorandum" attached to it is another four pages long and is almost entirely redundant to the "opposition" itself.

APPENDIX B

The Fifth Amendment of the Constitution of the United States:

Amendment [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment of the Constitution of the United States:

Amendment [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1257, Title 28, United States Code

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Rule 16.5, Arizona Rules of Criminal Procedure,
17 Arizona Revised Statutes

RULE 16.5 DISMISSAL OF PROSECUTION

a. On Prosecution's Motion. The court, on motion of the prosecutor showing good cause therefor, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8.

b. On Defendant's Motion. The court, on motion of the defendant, shall order that a prosecution be dismissed upon finding that the indictment, information or complaint is insufficient as a matter of law.

c. Record. The court shall state, on the record, its reasons for ordering dismissal of any prosecution.

d. Effects of Dismissal. Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court finds that the interests of justice require that the dismissal be with prejudice.

e. Release of Defendant; Exoneration of Bond. When a prosecution is dismissed, the defendant shall be released from custody, unless he is in custody on some other charge, and any appearance bond exonerated.

Rule 26.1, Arizona Rules of Criminal Procedure,
17 Arizona Revised Statutes

RULE 26.1 DEFINITIONS; SCOPE

a. **Judgment.** The term judgment means the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant, or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty.

b. **Sentence.** The term sentence means the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty.

c. **Determination of Guilt.** The term determination of guilt means a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or no contest.

d. **Scope.** Rule 26 shall not apply to minor traffic offenses. Rules 26.3, 26.4, 26.5, 26.6, 26.7, 26.8 and 26.15 shall only apply to the Superior Court.

Rule 35.1, Arizona Rules of Criminal Procedure,
17 Arizona Revised Statutes

RULE 35.1 MOTIONS: FORM, CONTENT AND RIGHTS OF REPLY

Unless otherwise specified in these rules, all motions shall be typewritten, double-spaced on 8.5 X 11 inch paper and shall contain a short, concise statement of the precise nature of the relief requested, shall be accompanied by a brief memorandum stating the specific factual ground therefor and indicating the precise legal points, statutes, and authorities relied upon, and shall be served to all other parties. Each party may within 5 days file and serve a response, and the moving party may within 3 additional days file and serve a reply, which shall be directed only to matters raised in a response. Responses and replies shall be in the form required for motions. If no response is filed, the motion shall be deemed submitted on the record before the court.

APPENDIX C

Filed by Clerk
Aug 16 1990
Court of Appeals
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE JNC COMPANIES, an Arizona corporation Petitioner, v. THE HONORABLE THOMAS MEEHAN, a Judge for THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, Respondent, and FRED T. BOICE, in his official capacity as trustee in bankruptcy for The JNC Companies; THE STATE OF ARIZONA, Real Parties in Interest	)	2-CA-SA 90-0113 Department B OPINION

SPECIAL ACTION PROCEEDINGS
RELIEF GRANTED

Donald E. Gabriel
Seefeldt, Sparks &

Tucson
Attorney for
Petitioner

Neal, P.C.
By Ralph E. Seefeldt Tucson
Attorneys for Real Party
in
Interest Boice

Stephen D. Neely, Pima County Attorney
By Millard Rowlette Tucson
Attorneys for Real Party
in
Interest State of Arizona

R O L L, Presiding Judge.

Petitioner The JNC Companies (JNC) seeks special action relief from the trial court's order declaring that JNC was represented by counsel selected by JNC's trustee in bankruptcy (Trustee) rather than counsel chosen by JNC's board of directors (board). Because JNC has no equally plain, speedy and adequate remedy by appeal and because we conclude that the trial court abused its discretion, we accept jurisdiction and grant relief. Ariz.R.P.Spec.Action 1, 3, 17B A.R.S.

FACTS AND PROCEDURAL HISTORY

In September of 1987, JNC, an Arizona corporation, filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code (the Code). 11 U.S.C. ss 1101, et seq. Real party in interest Fred T. Boice was appointed Trustee. In November of 1988, the Pima County Attorney's office filed a criminal complaint against JNC and Randall Jenkins, president and majority shareholder of JNC, in CR-24054, alleging numerous counts of commercial bribery, fraudulent schemes and artifices, criminal enterprise and securities fraud. In June of 1989, Jenkins filed a motion to dismiss all charges pursuant to Ariz.R.Crim.P. 16.5(b), 17 A.R.S., or in the alternative, a motion to remand for a finding of probable cause pursuant to Rule 5.5. The motion was denied in October. Jenkins sought special action relief and this court declined to accept jurisdiction.

On September 13, 1989, Jenkins, JNC and other parties were indicted on numerous felony counts, including securities law violations, in CR-28738, the underlying proceeding. The Trustee subsequently notified Jenkins of his intention to have JNC enter into a plea agreement in CR-28738 and sought authorization from the bankruptcy court. Through his bankruptcy attorney, Jenkins filed a motion in bankruptcy court opposing the Trustee's plea bargaining on behalf of JNC. Thereafter, the bankruptcy court entered a minute entry order on January 2, 1990, authorizing the Trustee to plea bargain on behalf of JNC in both pending criminal matters. During the same period of time, JNC's board retained counsel to represent JNC in the criminal proceedings. On behalf of JNC, that counsel filed a motion in superior court to dismiss, a motion for appointment of independent counsel, a motion for determination of JNC's indigency and a motion to disqualify the Trustee, seeking a ruling on whether the Trustee could proceed with the proposed JNC plea agreement.

On June 1, 1990, the board-retained JNC counsel and Jenkins filed a motion in both criminal proceedings for a change of judge for cause. On July 3, 1990, at the hearing on JNC's motion, respondent presiding judge of the Pima County Superior Court ruled that counsel retained by the Trustee properly represented JNC in Pima County Cause Nos. CR-28738 and CR-24054 and that JNC's privately retained counsel was not properly before the court. This special action followed.

ISSUE

The sole issue before this court is whether a corporation that is a defendant in a state criminal proceeding and a debtor in a bankruptcy proceeding has the right to retain counsel of its own choosing in the criminal proceeding or whether it must accept counsel chosen by the trustee in bankruptcy and the trustee's decision to plea bargain. We conclude that the corporation's federal and state constitutional rights to counsel and to a jury trial are violated by compelling the corporation to accept counsel selected by the bankruptcy trustee and the trustee's decision to waive the right to a jury trial.

CONSTITUTIONAL RIGHTS

Where, as here, a corporation is subject to criminal prosecution, it is guaranteed a right to counsel by the Sixth Amendment to the United States Constitution. See United States v. Thevis, 665 F.2d 616, 645 n. 35 (5th Cir.1982) and United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3rd Cir.1979), and article II, s 24 of the Arizona constitution. "Due process of law, as it is expressed through the right-to-counsel provisions of the state and federal constitutions, comprehends a right to appear and defend with retained counsel of one's own choice." Pipkins v. Helm, 132 Ariz. 237, 239, 644 P.2d 1323, 1325 (App.1982). As a criminal defendant, JNC also has the right to a jury trial. U.S. Const. amend. VI; U.S. Const. art. III, s 2, cl. 3; Ariz. Const. art. II, ss 23 and 24.

DUTIES AND POWERS OF BANKRUPTCY TRUSTEE

The real parties in interest, the State of Arizona and the Trustee, insist that the Trustee properly represents JNC in both the bankruptcy and criminal proceedings. The authority for this broad power over the debtor corporation, they contend, is provided by the Code, the bankruptcy rules and applicable law.

a. Trustee's responsibilities re: the estate.

When a bankruptcy proceeding is commenced, all corporate property passes to the bankruptcy estate and the estate is represented by the trustee. 11 U.S.C. ss 323, 541. The trustee is accountable for that property and has the duty to maximize the estate. 11 U.S.C. s 704(1), (2). The trustee must investigate the debtor's financial affairs, 11 U.S.C. ss 704(4), 1106(a)(3), and may sue the officers, directors and other insiders on behalf of the estate to recover fraudulent or preferential transfers of the debtor's property. 11 U.S.C. ss 547(b)(4)(B), 548. Clearly, the trustee has broad powers in dealing with matters that relate to the estate, including the power to actively litigate matters outside bankruptcy court which have an impact upon the estate.

b. Estate distinguishable from debtor.

The estate created by the filing of a bankruptcy petition "is an entity distinct from the debtor." 8A C.J.S. Bankruptcy s 105 at 104 (1988). Not everything that belongs to the debtor becomes part of the bankruptcy estate over which the trustee has control. "The estate generally includes all legal or equitable interests of the debtor in property as of the commencement of the case...." Id., citing In re Larson, 56 B.R. 154 (Bkrtcy.D.Mont.1985); see also 11 U.S.C. s 541(a)(1). We find nothing in the bankruptcy code or case law to support the conclusion that once a bankruptcy proceeding is commenced, the debtor's constitutional rights pass through to the estate along with the property and property rights that are traditionally considered part of the estate.

"The trustee has standing only to represent the interests of the estate." 8A C.J.S. Bankruptcy s 28 at 45. Indeed, s 323(a) of the Code, relied upon by the state and the Trustee, provides that the trustee "is the representative of the estate...." 11 U.S.C. s 323(a) (emphasis added). The Code does not purport to designate the trustee as the representative of the debtor. Accordingly, we do not believe that s 327 authorizes the trustee to retain counsel against the debtor's will to represent the debtor in a criminal proceeding in which the debtor, not the estate, is a defendant.

c. Trustee's power to retain professionals.

Section 327(a) gives the trustee the power to retain professionals "to represent or assist the trustee in carrying out the trustee's duties under [the Code]." Those duties, as described generally in s 323 and more specifically throughout the Code, relate directly to the management and preservation of the estate. Similarly, such professionals may be retained if already employed by the debtor and "necessary in the operation of [the debtor's] business," 11 U.S.C. s 327(b), and where it is in the estate's best interests. s 327(d), (e). Section 327 has been construed to allow the court to appoint counsel to represent the debtor in a criminal proceeding where the debtor is requesting such appointment and

demonstrates that the representation will be beneficial to the estate. See The Official Comm. of Disputed Litig. Creditors v. McDonald Invs., Inc., 42 B.R. 981 (N.D.Tex.1984); In re Duque, 33 B.R. 199 (Bkrtcy.S.D.Fla.1983); but see In re Delk, 27 B.R. 86 (Bkrtcy.W.D.Okla.1983) (appointment of counsel to defend debtor against indictment and use of estate funds to pay counsel do not relate to duties under the Code and are not authorized under s 327(a)); In re Pajarito Am. Indian Art, Inc., 11 B.R. 807 (Bkrtcy.D.Ariz.1981) (estate funds cannot be used to pay debtor's criminal defense counsel). Section 327, contrary to the contention of the state and the Trustee, does not authorize the bankruptcy trustee to compel the debtor to be represented in a criminal prosecution by counsel of the trustee's choosing over the debtor's objection, nor does it authorize the trustee to waive the criminal defendant debtor's right to a jury trial.

d. Bankruptcy Rule 6009.

The state and the Trustee argue that Bankruptcy Rule 6009, 11 U.S.C., provides additional support for the Trustee's representation of JNC in the state criminal proceedings. The rule states:

> With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

The rule is inapplicable, even assuming state criminal proceedings against the debtor were intended to be within its purview. The rule allows the trustee to defend actions pending at the time the bankruptcy proceeding is commenced. The proceeding below was commenced at least one year after the bankruptcy action. Moreover, the rule must be construed in harmony with the Code. The capacity to sue or be sued under s 323(b) "is a logical adjunct to the duties to be performed by the trustee and to the authority vested in him by Bankruptcy Rule 6009." 2 Collier on Bankr., s 323.02 at 323-4 (15th ed. 1990) (footnote omitted). As such,

we conclude that it allows the trustee to prosecute and defend actions that impact upon the trustee's duties in managing the estate, again recognizing the separateness of the debtor and the debtor's estate.

e. Weintraub inapplicable.

The state and the Trustee contend that Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985), also supports their position. Weintraub, however, is distinguishable because it involved the trustee's ability to waive the corporate debtor's attorney-client privilege during an investigation by the Commodity Futures Trading Commission for purposes of discovering information from corporate counsel regarding the conduct of the corporation's prior managers; it did not involve the trustee's waiver of the corporation's constitutional rights. Although Congress, in its plenary power, may abrogate certain state laws, U.S. Const. art. I, s 8, cl. 4, it may not do so in violation of constitutional rights. See, e.g., Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589-90, 55 S.Ct. 854, 863-64, 79 L.Ed. 1593, 1604-05 (1935); In re Penn Cent. Transp. Co., 494 F.2d 270, 278 (3rd Cir.1974); United States v. Rome, 414 F.Supp. 517, 519 (D.Mass.1976).

Applying a balancing test, the Weintraub Court held that allowing the trustee to waive the attorney-client privilege as to the pre-bankruptcy communications of a corporate debtor did not impair a federal interest and that certain bankruptcy goals would be frustrated if the privilege could not be waived, including the trustee's power and obligation to investigate prior management to uncover and assert causes of action against them. In Weintraub, the Supreme Court focused on the fact that the trustee's functions in a bankruptcy proceeding "are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors." 471 U.S. at 356, 105 S.Ct. at 1995, 85 L.Ed.2d at 383. It is the trustee that may continue operating the business. For that purpose, the pre-bankruptcy managers are "completely ousted." 471 U.S. at 352-53, 105 S.Ct. at 1993, 85 L.Ed.2d at 381.

While the Supreme Court stated that a bankruptcy trustee has broad control over the debtor, it was in the context of the management of the corporation and in the exercise of duties provided by the Code. We find no indication that Weintraub extends this control to a criminal proceeding against the debtor, or that Weintraub authorizes the trustee to exercise his/her power over the estate at the expense of the debtor's constitutional rights.

CONFLICT OF INTEREST

In addition to the fact that the trial court's order violates JNC's right to retained counsel of its own choice, Pipkins v. Helm, supra, the Trustee, who owes a fiduciary duty to the creditors, see In re O.P.M. Leasing Servs., Inc., 28 B.R. 740 (Bkrtcy.S.D.N.Y.1983), and whose primary responsibility is to preserve the estate, has a conflict of interest that counsel retained by the corporation would not have. Indeed, JNC's admission of wrongdoing purportedly could be used as a basis for rescinding investor promissory notes, rather than forgiving them, thereby avoiding the tax burdens to such investors of having to recognize ordinary income. Additionally, the Trustee concedes in its response that the plea negotiations were conducted based upon a cost/benefit analysis of the risks involved in not accepting a plea offer, "a business decision made by the Trustee in conjunction with his duties." The Trustee admits his eagerness to accept the state's plea offer because JNC would only be fined $100, without discussion of whether the corporation, through the acts of its directors and/or shareholders, would likely be convicted of the crimes charged based upon the anticipated evidence and whether JNC, the actual defendant, had chosen to waive its right to a jury trial. Thus, the Trustee reasons, JNC's guilty plea would avoid the risk of extensive fines and potential forfeitures which would diminish the bankruptcy estate. Additionally, the Trustee claims, a guilty plea by JNC would enable the estate to avoid the

incurrence of substantial legal fees. But see In re Pajarito Am. Indian Art, Inc., supra.[1]

Although financial considerations appropriately dictate the Trustee's preference of alternatives, it is for this very reason that the Trustee should not control JNC's defense in the criminal prosecution. The mere fact that JNC filed a bankruptcy petition does not mean that the only counsel to which it is entitled in a criminal proceeding is one who makes decisions from purely a business perspective and based upon how to resolve the criminal matter so as to maximize the benefit to creditors. Nor does it mean that JNC must relinquish its right to a jury trial simply because the Trustee considers it a sound business decision and in the estate's best interests. When a criminal defendant is offered a plea agreement, many factors are relevant to the

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[1] Although the extent to which the resolution of the criminal proceeding might impact upon JNC's bankruptcy is not material to our decision, we note that the Trustee misperceives the likely import of this court's decision. The Trustee cites no authority in support of its concerns. First, although jurisdictions are split on this issue, an Arizona bankruptcy court has held that estate funds may not be used to pay a debtor's criminal defense counsel. In re Pajarito Am. Indian Art, Inc., supra. Second, with regard to any forfeitures of property, there are a multitude of protections for the creditors, including the following: (1) the argument that the property is now estate property under s 541(A)(1) of the Code which includes "all legal or equitable interests of the debtor in property as of the commencement of the case"; (2) any forfeiture proceeding by the state is subject to the automatic stay provision of s 362(a), see Sachs v. Ryan, 15 B.R. 514 (Bkrtcy.D.Md.1981) and Sachs v. Ryan, 32 B.R. 794 (Bkrtcy.D.Md.1983); and (3) to the extent a forfeiture claim could be presented as a claim against the estate, it would be subject to the priority provisions of s 507 of the Code, see also s 726(a) (order of distribution in the event JNC converts the proceeding to one under Chapter 7 of the Code). As a consequence, any forfeiture would be satisfied after unsecured creditors, with any deficiency remaining nondischargeable. Cf. Sachs v. Ryan, supra, 15 B.R. 514. Finally, with regard to the Trustee's concerns that penalties and fines would deplete the estate, the reorganization plan submitted by the Trustee pursuant to s 1123 of the Code and which may be influenced by creditors, 11 U.S.C. s 1103(c)(3), will presumably assure that such payments are made after unsecured creditors have been compensated. Moreover, in the event the proceeding is converted to a Chapter 7 proceeding, there is ample support for the proposition that such claims would be disallowed. See Simonson v. Granquist, 369 U.S. 38, 82 S.Ct. 537, 7 L.Ed.2d 557 (1962); In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59 (S.D.N.Y.1976).

defendant's decision. The financial impact of proceeding to trial is but one factor to be considered. Others include the opportunity to vindicate one's name, disprove inaccurate allegations, and the likelihood of conviction. Clearly, the decision to waive the right to jury trial in a criminal proceeding is the defendant's right, not the trustee's. As this state's constitution provides, "[t]he right of trial by jury shall remain inviolate." Ariz. Const. art. II, s 23.

BANKRUPTCY COURT AUTHORIZATION OF REPRESENTATIVE

The bankruptcy court authorized the Trustee to negotiate the plea agreement on behalf of JNC. Because JNC, as opposed to its estate in bankruptcy, is the party to the criminal action and in light of our conclusions regarding the limitations on the Trustee's powers and duties, the bankruptcy court was without jurisdiction to decide who would represent JNC in the state criminal proceedings and could not authorize the Trustee to waive JNC's right to a jury trial. In Younger v. Harris, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669, 675 (1971), the Supreme Court stated:

> Since the beginning of the country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

This policy applies equally where the federal court is acting under the Code. In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59, 63 (S.D.N.Y.1976); see also In re Trial West, Inc., 17 B.R. 330 (Bkrtcy.D.S.D.1982).

It is clear that Congress particularly intended to preclude federal bankruptcy courts from interfering with state criminal proceedings. For example, criminal proceedings against the debtor are excepted from the automatic stay provision of s 362(a). 11 U.S.C. s 362(b)(1); see also In re M. Frenville Co., Inc., 744 F.2d 332 (3d Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 911,

83 L.Ed.2d 925 (1985); *Trail West, Inc.*, supra; 2 Collier on Bankr. 362.05 [1].

For the reasons set forth above, the bankruptcy court's action is not dispositive of the issue before us.

CONCLUSION

We conclude that the right to counsel and the right to a jury trial under the Sixth Amendment to the United States Constitution and article II, s 24 of the Arizona Constitution must remain inviolate notwithstanding the fact that a defendant is also debtor in a bankruptcy proceeding. Because JNC's federal and state constitutional rights are violated by the trial court's order, the order is vacated, and this matter is remanded for further proceedings consistent with this decision.

/s/_____
JOHN M. ROLL, Presiding Judge

CONCURRING:

/s/_____
MICHAEL A. LACAGNINA, Judge

/s/_____
JAMES D. HATHAWAY, Judge